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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

JOHN HERDEAN,

Petitioner,

v.

UNITED STATES of AMERICA,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether or not a defendant that pleads guilty has a right to access pre-trial Brady favorable evidence;

(A) - Whether a defendant's counsel provided ineffective assistance of counsel by not obtaining Brady evidence prior to having a defendant enter a guilty plea;

(B) - Whether Bagley's post-appellate review standard of materiality as applied to in a guilty plea context, is an unconstitutional burden shifting scheme that violates due process by requiring the defendant to disprove evidentiary issues in the Government's case; and

(C) - Whether a test of 'presumption of materiality' is to be applied in a pre-trial, pre-plea disclosure analysis of Brady evidence 'favorable' where the prosecutor does not respond to defendant's request for Brady favorable evidence?

PARTIES

The parties to this proceeding are set forth in the caption.

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PETITION FOR CERTIORARI

Petitioner John Herdean respectfully prays that this Court grant a writ of certiorari to review the judgement and opinion of United States Court of Appeals entered on October 1, 2010.

OPINIONS BELOW

The October 1, 2010 opinion of the Court of Appeals, which is not reported, is set out at pp. 1a of the Appendix. The February 10, 2010 order and opinion of the District Court for the Northern District of Georgia, which is not reported, is set out at pp. 1a-2a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on October 1, 2010 (a subsequent application was filed and granted for an extension of time to file a petition for writ of certiorari – due by February 28, 2011). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be... deprived of life, liberty, or property, without due process of law...

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.



STATEMENT OF THE CASE

On, May 27, 2008, Petitioner was coerced to plead guilty by his attorneys Edward T.M. Garland ("Garland") and Jana L. Harris ("Harris") to one count of conspiracy to commit bank and wire fraud in violation of 18 U.S.C. §§371, 1343, and 1344, and sentenced to 30 months of imprisonment on September 17, 2008.

On January 5, 2010, Petitioner filed a motion for production of Brady, Giglio, and Jencks materials which was served on Petitioner's counsel and/or was not served on Petitioner's counsel. (App. 6a-15a).

On January 25, 2010, Petitioner filed a motion for the Government to certify that all their Brady, Giglio, and Jencks obligations were satisfied (App. 16a-35a).

The Government did not file any response to any of said motions filed by the Petitioner (App. 3a).

On February 10, 2010, the district court entered an Order denying said motions on the ground that Petitioner was not entitled to such Brady, Giglio, and Jencks materials (App. 3a-5a). Petitioner timely filed a Notice of Appeal on February 17, 2010.

(i) Statement of Facts

On or about March, 2005, Uriel Enrique Castiblanco ("Castiblanco") (the co-defendant) approached Petitioner to be an investor in the property located at 5419 Spinnaker Lane, Gainesville, Georgia ("Spinnaker Property") (which is the subject matter property involved in this criminal action).

Petitioner had an agreement with Castiblanco that Petitioner would invest up to $100,000 at any given time until the property would be sold.

It was the responsibility of Castiblanco to acquire the remaining balance needed to finance the purchase of the Spinnaker Property, including locating a buyer to qualify for any mortgage required.

Petitioner had no mortgage experience at the time, and relied on Castiblanco to manage any mortgage financing required to purchase the Spinnaker Property, thus Castiblanco arranged for Mr. Luis M. Chamorro ("Chamorro"), his friend for many years, to buy the Spinnaker Property under his name and credit.

Petitioner was informed that Chamorro was fully qualified to purchase the Spinnaker Property and get financed by explaining Chamorro's father was very wealthy, owning many successful restaurants.

Therefore, Petitioner did not concern himself with any of the details of the mortgage application process, and was not able to decipher the viability of Chamorro's borrowing capabilities, only that it seemed that Chamorro had access to wealth.

Petitioner had absolutely nothing to do with the creation, planning, organization, and executing false information or false documentation on behalf of Mr. Chamorro. Petitioner was factually innocent.

From the first time Petitioner met his attorneys Garland and Harris, he informed them that he never conspired with Castiblanco to defraud any lenders, and that he was strictly an investor in the Spinnaker

Property where he ultimately lost approximately $65,000 by being defrauded by Castiblanco's scheme.

Additionally, Petitioner informed his attorneys, Garland and Harris that, he will not plead guilty to any crime and wanted to go to trial if the Government intended to charge him.

On or about April, 2008, Petitioner's attorneys Garland and Harris intentionally and deliberately coerced Petitioner into pleading guilty by intentionally and deliberately misleading Petitioner into believing that because he invested monies with Castiblanco, he was also guilty. Garland and Harris also informed Petitioner that because Castiblanco illegally utilized such funds to further his scheme to defraud other lenders, besides the Petitioner, the Petitioner is also guilty of defrauding the other lenders in the Spinnaker Property.

Additionally, Petitioner's counsel Garland and Harris refused to file any Brady discovery requests upon the Government before Petitioner pled guilty. The record does not indicate where attorneys Garland and Harris ever filed any such Brady discovery requests upon the Government.

On May 27, 2008, the prosecutor for the Government intentionally and deliberately made false statements about the Petitioner to the Court during the Rule 11 hearing.

The prosecutor intentionally and deliberately falsely accused Petitioner of conspiring with Castiblanco and Chamorro to defraud the other lenders (other than the Petitioner being a lender to the Spinnaker Property) by creating false information and false documentation to submit to said lenders.

Petitioner informed his attorney Garland during the Rule 11 hearing that the assessment of facts presented by the prosecutor were not correct, and told Garland that he wanted to inform the Court of the misstatements made by the prosecutor and to correct such facts. Garland got mad, and yelled at Petitioner, telling him that he must agree with the prosecutor.

REASONS FOR GRANTING THE WRIT

This petition asks the Court to address a simple but recurring question that arises frequently in our criminal justice system whenever a defendant pleads guilty – whether a defendant has the right to access pre-trial Brady favorable evidence?

Additionally, does Bagley's post-appellate review standard of materiality as applied to in a guilty plea context, offer an unconstitutional burden shifting scheme that violates due process by requiring the defendant to disprove evidentiary issues in the Government's case?

Finally, whenever the government does not respond to a defendant's request for Brady favorable evidence (especially when the government does not respond to a motion to certify that their Brady obligations have been satisfied in such a case) – should the Court adopt a test of a 'presumption of materiality' to be applied in a pre-trial, pre-plea disclosure analysis?

The Court should grant the petition for certiorari to review these questions for three reasons:

First, the circuit courts are divided on the first question (whether or not a defendant that pleads guilty has access to pre-trial Brady favorable evidence). All circuits but the Fifth and Eleventh Circuits have decided that a defendant has a right to access Brady favorable evidence. Given the significant attention that this issue has received in the Court of Appeals, the Court should grant certic ari to resolve the disagreement among the circuits.

Review is also warranted because the question is important. The vast majority of convictions are obtained by negotiated guilty pleas, and if access to Brady "favorable" is not given to a defendant it encourages the prosecution to intentionally not disclose certain "favorable" evidence to the defense because it does not want to jeopardize its negotiating process, and has no consequences to suffer once the defendant pleads guilty. This non-disclosure deprives the defendant of an "knowing", "intelligent" and "informed" decision whether or not to plead guilty and

instead insists on going to trial. Brady disclosure can only serve to enhance the accuracy of such negotiated pleas by eliminating a major hazard for the innocent.

Second, the Court should decide that Bagley's post-appellate review standard of materiality in a guilty plea context is unconstitutional because the Bagley materiality framework of analysis, post-trial, impermissibly shifts the burden of proof to the defense to establish a "reasonable probability" the outcome of the proceeding would have changed, rather, than requiring the Government to prove beyond a reasonable doubt the verdict was not influenced by the Government's breach of its constitutional disclosure duties under the Fifth Amendment.

Additionally, Bagley's materiality post-trial analysis is wholly unworkable in a pre-trial, pre-plea context, where "materiality" cannot accurately be determined, a priori, until the evidence is present.

Third, in Brady, the Court clearly expressed this concept, 373 U.S. at 87, quoting the Maryland Court of Appeals, where it stated: "we would be too dogmatic to attempt to determine how a jury would have viewed this evidence.". (paraphrased).

Thus, the Brady Court implicitly incorporated a 'presumption of materiality' for 'favorable' evidence undisclosed to the defense, whether or not the good faith or bad faith of the prosecution was at issue.

Bagley's subsequent "materiality" standard evolved without adequately considering Brady's implicit 'presumption of materiality' for undisclosed favorable evidence withheld by the prosecution. However, Strickler v. Greene's analysis regarding the open file policy, Brady disclosure, also employed an implicit 'presumption of reliance' on the prosecutor's implicit statement of an 'open file' policy, i.e., all Brady evidence was disclosed, thus implying the Brady evidence did not exist if not in the open file.

The Sudikoff doctrine of applying a pre-trial, pre-plea analysis of 'favorable evidence' parallels Brady's 'presumption of materiality' doctrine following the Maryland Court of Appeals observation that a court is not equipped to read jurors' minds as to whether evidence was material or not, thus, all favorable evidence is 'presumed material' requiring reversal where the prosecution withheld evidence.

The Court should apply a new test for materiality, rather than the Bagley post-trial, post-plea appellate review standard that is unworkable in a pre-trial context.

Petitioner's test incorporates Brady's quotation from the Maryland Court of Appeals, and incorporates the Basic v. Levinson 'presumption of reliance' (Strickler v. Greene) to establish a 'fraud-on-the-court', where Government lawyers willfully suppressed Brady evidence, Demjanjuk, by willfully and deliberately refusing to respond to Petitioner's Brady request and request for Brady certification.

I. This Court has not decided Whether or not a defendant that pleads guilty has a right to access pre-trial Brady favorable evidence and lower courts are divided on the issue.

Standard Unsuited To Pre-Trial Favorable Evidentiary Issues

(a) The United States v. Bagley, 473 U.S. 667 (1985) appellate review post-trial standard of materiality should not be used to evaluate pre-trial disclosure obligations.

The structure of Bagley's materiality analysis compares all evidence offered at trial to determine whether the nondisclosed evidence was "material". Thus, obviously Bagley's "materiality" standard is unworkable pre-trial where all the evidence (exculpatory and inculpatory) is not admitted.

(b) A new paradigm: 'presumption of materiality' standard; is necessary to comply with the Fifth Amendment and Brady v. Maryland, 373 U.S. 83 (1963).

Berger v. United States, 295 U.S. 78, 88 (1935) especially noted that the prosecutor's duty is to seek justice, not just to obtain convictions: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty

whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done [according to the Constitution]". (emphasis added).

Thus, for "justice to be done [according to the Constitutional disclosure standards]" of Brady and the Due Process Clause of the Fifth Amendment, i.e., the disclosure of material favorable evidence, pre-trial, requires a standard and a process of analysis applying that standard comporting with due process requirements: A fundamentally new rule of constitutional analysis applied in a pre-trial context.

(c) The lower federal appeals[1] and district[2] courts have recognized the inconsistencies in the pre-trial application of an appellate review standard of disclosure espoused in Bagley and have entertained post-plea Brady challenges.

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[1] United States v. Avellino, 136 F.3d 249, 254-62 (2d Cir. 1998); Sanchez v. United States, 50 F.3d 1448, 1453-54 (9th Cir. 1995); United States v. Wright, 43 F.3d 491, 495-96 (10th Cir. 1994); White v. United States, 858 F.2d 416, 421-22 (8th Cir. 1988); Miller v. Angliker, 848 F.2d 1312, 1319-20 (2d Cir. 1988).

[2] Indelicato v. United States, 106 F.Supp.2d 151, 155-59 (E.D. Mass 2000); United States v. Brown, No. 99-508-4, 2000 U.S. Dist. Lexis 6656 at 10511 (E.D. Pa. May 5, 2000); Banks v. United States, 920 F.Supp. 688, 691 (E.D. Va. 1996).

However, the courts which considered a post-plea Brady challenge, supra notes 1 and 2, have all utilized the Bagley post-trial appellate review standard of "materiality" in determining whether the challenge had merit.

Moreover, this Court, having never applied Brady and Bagley's doctrine in a guilty plea context;[3] the issue is ripe for appellate review to settle the issue and define a new rule applicable to pre-trial, pre-plea disclosure obligations.

The Sudikoff Pre-Trial Disclosure Doctrine

(a) In United States v. Sudikoff,[4] 32 F.Supp.2d 1196 (C.D. Cal. 1999) the district court faced with a pre-trial disclosure issue departed from the Bagley post-trial "materiality" analysis[5] and instead utilized the explicit language in Brady[6] of "favorable" material evidence.[7]

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[3] United States v. McClearly, 112 F.3d 511 (4th Cir. 1997) (unpublished) ("The Supreme Court has never applied Brady, or its progen[ies], to a guilty plea.").

[4] The district court in Sudikoff offered an alternative paradigm to evaluate pre-trial Brady requests analytically different from Bagley.

[5] Bagley, 473 U.S. at 682, a reasonable probability of a different result.

[6] Brady 373 U.S. at 87.

[7] Sudikoff, 32 F. Supp.2d at 1199.

The district court in Sudikoff was one of the first, if not the first district court to break away from Bagley's post-trial appellate review standard of materiality and adopt a pre-trial standard focused on the explicit language of Brady, 373 U.S. at 87 of evidence "favorable" to the defendant.

Sudikoff, 32 F.Supp.2d at 1199 acknowledged: "Therefore, post-trial standards [of materiality] and cases applying them are not helpful for determining the government's disclosure obligations [ ] [b]ecause the definitions of materiality as applied to appellate review [U.S. v. Bagley, and its progenies] are not appropriate in the pre-trial discovery context," the Court relies on the plain meaning of "evidence favorable to an accused" as discussed in Brady.[8]

In its analysis of "favorable" evidence under Brady the Sudikoff court fashioned the following standard: "evidence that may reasonably be considered favorable to the defendant's case and that would likely lead to admissible evidence[.]" Id at 1201.

Moreover, the Court adopted a 'presumption of favorableness' explaining quoting United States v. Van Brandy,[9] citing United States v. Goldberg:[10] "the

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[8] Brady, 373 U.S. at 87.

[9] 726 F.2d 548, 552 (9th Cir. 1984).

[10] 582 F.2d 483, 489 (9th Cir. 1978).

government where doubt exists as to the usefulness of evidence, should resolve such doubts in favor of full disclosure ... [.]"

Hence, Sudikoff's 'presumption of favorableness' applied in the pre-trial context, is analytically in opposition to Bagley's post-trial materiality test, which requires all evidence to be analyzed after-the-fact to determine the affect of the nondisclosed "favorable" evidence.

The Sudikoff court's 'presumption of favorableness' pre-trial test for Brady disclosure is functionally equivalent to Bagley's post-trial appellate review "materiality" analysis, only applied in a different context.

(b) Furthermore, the Court in Strickler v. Greene, 527 U.S. 263 (1999), noted it was proper for the defense lawyer to rely on a presumption that the prosecutor's in that case, open file policy contained all favorable evidence, i.e., a presumption of reliance on full disclosure.

The Court explaining stated:

> "If it was reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but also the implicit representation that such materials would be included in the

> open files tendered to defense counsel for their examination, we think such reliance ... [is] equally reasonable." (emphasis added).

The Court recognized a "presumption of reliance" by the defendant on the prosecution's implicit statement, that all material disclosures had been made according to Brady's requirements, thus, a subsequent discovery of nondisclosure of relevant material evidence would constitute a presumption of a pre-trial Brady violation.

However, the Strickler Court, applied the Bagley 'post-trial' appellate review standard of "materiality" rather than a pre-trial presumption of "favorableness":[11] which is analytically inconsistent and uncompatible with pre-trial disclosure issues, thus, unconstitutionally shifting the burden of proof from the prosecution to the defendant on all elements of the offense.

(c) Brady is a constitutional obligation placed on the Government to disclose all favorable material evidence to an accused deriving its origins from the Due Process Clause of the Fifth Amendment.[12]

Particularly in addressing whether or not "materiality" of the omitted evidence in Brady would

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[11] Sudikoff, 32 F.Supp.2d at 1199.

[12] Brady, 373 U.S. at 86-87.

be material, the Court quoting the court of appeals acknowledged after-the-fact post-trial analysis was useless explaining:

> " ... [w]e cannot put ourselves in the place of the jury and assume what their views would have been as to whether it did or did not matter whether it was Brady's hands or Boblit's hands that twisted the shirt about the victim's neck. It would be 'too dogmatic' for us [as an appellate after-the-fact court] to say that the jury would not have attached any significance to this evidence[.]" (emphasis added).

The Court stated clearly that an after-the-fact Bagley materiality analysis was unworkable, "it would be 'too dogmatic' to say" what the jury would have thought of the undisclosed evidence. (emphasis added).

The Court's Brady analysis specifically and expressly rejected the Bagley after-the-fact post hoc "materiality" analysis in favor of a 'presumption of materiality' threshold to be applied where evidence was intentionally withheld from an accused. The implied 'presumption of materiality' of the Court's analysis in Brady[13] in regard to whether or not the omitted evidence affected the outcome of the guilt or

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[13] Brady, 373 U.S. at 88-89.

punishment, cast the burden on the government to offer proof; but the Court ultimately reasoned that it could not stand in the shoes of the jury and decide what was material and what was not. Id. Hence, expressly rejecting a burden shifting post-trial materiality test advanced in Bagley and its progenies.

Therefore, the holding in Brady is in conflict with Bagley and its progenies post hoc materiality analysis, and thus, the inherent inconsistencies Bagley produces when attempting application to a pre-trial disclosure violation analysis.

(d) Bagley's appellate review analysis applied in the pre-trial context, which it is wholly unsuited for, yields unintended dire consequences for most defendants: a "dogmatic" jury substitution analysis shifting the burden of proving whether or not nondisclosure by the government was prejudicial, not necessarily resulting in a different outcome, but yet unethical and subject to the court's supervisory authority.

The new paradigm of pre-trial analysis of a Brady violation as advanced in Sudikoff[14] rejecting the Bagley post-trial "materiality" post-hoc analytical framework must be adopted to comply with the Fifth Amendment Due Process Clause.

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[14] 32 F.Supp.2d at 1198-99

A. Analysis and Discussion

(i) Applying the Sudikoff analysis requiring the government to disclose all favorable evidence affecting the guilt or punishment of Petitioner,[15] the government by refusing to respond to Petitioner's motion (App. 6a-15a) and certification of compliance (App. 16a-35a) with Brady, Giglio, and Jencks materials, triggered the government's affirmative, duty to file a certification of compliance.[16]

(ii) Petitioner contends the government's failure to respond[17] "fully" to his Brady motion and motion for Brady certification (Id) created a positive inference

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[15] Sudikoff, 32 F.Supp.2d at 1199.

[16] United States v. Price, 566 F.3d 900, 910 (9th Cir. 2009) ("The proponent of a Brady claim, i.e., the [appellant] bears the initial burden of producing some evidence to support an inference that the government possessed or knew about material favorable to the defense and failed to disclose it ... the burden shifts to the government to demonstrate that the prosecutor satisfied his duty to disclose all favorable evidence known to him or that the prosecutor satisfied his duty to disclose all favorable evidence known to him or that the prosecutor satisfied his duty to disclose all favorable evidence known to him or that he could have learned from others [FBI agents] acting on the government's behalf." citing Kyles v. Whitley, 514 U.S. 419, 437 (1995).

[17] United States v. Agurs, 427 U.S. 97, 106 (1976)("When the prosecution receives a specific and relevant [Brady] request, the failure to make any response is seldom, if ever, excusable."; United States v. Bagley, 473 U.S. 667, 682 (1985) ("We agree that the prosecutor's failure to respond fully to a Brady request may impair the adversarial process[.]").

the government withheld Brady evidence, thus the burden shifted to the government to prove compliance with Brady. The Bagley Court thought a "reviewing court may consider any adverse effect that the prosecutor's failure to respond might have on the preparation or presentation of the [Petitioner's] case."

The Court further specifically noted the reviewing court has a responsibility to "assess the possibility that such [adverse] effect might have ... taken had the [Petitioner] not been misled by the prosecutor's incomplete response. Bagley, 473 U.S. at 683.

Thus, where, the prosecution willfully and deliberately failed to not only "fully respond", but failed to respond at all to Petitioner's Brady request, Petitioner has supplied the necessary inference, and the Court of Appeals was required to assess the "adverse effect" of the prosecution's not responding to Brady requests had on Petitioner's case.

Because, there is no record the prosecution ever satisfied its Brady disclosure obligations, pre-trial, prior to Petitioner entering his coerced guilty plea, Petitioner contends his guilty plea was not "knowing and intelligently entered" and is thus void, Hill v.

Lockhart,[18] and the government willfully and deliberately "impaired the adversary process," prejudicing Petitioner's constitutional due process rights.

IA. Defendant's counsel provided ineffective assistance of counsel by not obtaining Brady evidence prior to having defendant enter a guilty plea.

(iii) Hill, 474 U.S. at 59, the prejudice inquiry to establish ineffective assistance of Petitioner's counsel, Garland, "focuses on whether counsel's constitutionally ineffective assistance of counsel affected the outcome of the plea process," i.e., would Petitioner have gone to trial absent Garland's professional errors in not seeking Brady evidence from the prosecution.

Hence, the plea is void[19] due to counsels' failure to adequately request Brady evidence. Petitioner's guilty plea was not knowing and intelligently entered conscience of the circumstances.

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[18] 474 U.S. 52, 59 (1985)(There is a reasonable probability had appellant's counsel filed Brady discovery motions obligating the prosecution to disclose its exculpatory evidence, appellant would have gone to trial); see note 1 supra for authority requiring the government to disclose Brady evidence pre-plea.

[19] Hill, 474 U.S. at 59.

(v) The District Court erred ruling Petitioner had no right to access Brady evidence post-plea. The District Court's February 10, 2010 Order was legal error.

The District Court's February 10, 2010 order (App. 3a-5a) exclusively relied on District Attorney's Office v. Osborne, 557 U.S. ___, 174 L.Ed.2d 38, 129 S.Ct. 2308 (2009), an inapposite case regarding a state criminal defendant's right to access DNA evidence post-conviction, for the erroneous proposition Petitioner was not entitled to Brady evidence post-conviction.

(vi) The Court in Brady v. Maryland, 373 U.S. 83 (1963) clearly held that the prosecution was required under the Due Process Clause of the Fifth Amendment to disclose all favorable evidence to an accused regarding the guilt or punishment of the accused. Id at 87.

There is no doubt Brady's disclosure obligations also apply to a defendant's punishment, thus, where a defendant is challenging his sentence, post-conviction, the Government is clearly required to make Brady disclosures. Id.

(vii) Moreover, the Court granted certiorari in Osborne, supra, to answer the question what was the proper vehicle a state prisoner must use (§1983 or §2255) to gain access to the potentially exculpatory DNA evidence.

Therefore, implicitly, the Court clearly acknowledged the defendant had a right to the potentially exculpatory DNA evidence, the question was how to go about accessing the Brady evidence. Id.

Petitioner Herdean's request for Brady evidence is distinguished from the factual basis in Osborne, supra; Herdean asked for a copy of the same Brady evidence the prosecution either provided to his attorneys or should have provided to his attorneys.

There is no proof, provided by the Government, it ever satisfied its Brady disclosure obligations pre-trial; thus Petitioner's motion (App. 16a-35a) for the Government to certify its compliance with Brady, U.S v. Price, 566 F.3d 900, 910 (9th Cir. 2009) was entirely within his right.

Distinguishing Osborne, supra, from Herdean's request, Osborne actually had access to the DNA evidence at trial, i.e., the prosecution disclosed the Brady evidence to Osborne's attorney, Osborne, supra, 174 L.Ed.2d at 45, who apparently, for "strategic" reasons declined the then state-of-the-art DNA test; purportedly because "she [Osborne's attorney] believed Osborne guilty."

By failing to respond to Petitioner Herdean's motion to certify (App. 16a-35a) the Government, unlike in Osborne, cannot prove it ever satisfied Brady pre-trial.

Hence, Osborne's, supra, analysis is fundamentally inapposite, and furthermore, was only dicta regarding the question presented to the Court on certiorari.

Accordingly, the District Court committed a clear legal error by erroneously misinterpreting the holding in Osborne, supra, in applying isolated dicta out of context, inappositely, to avoid requiring the Government to prove it complied with Brady pre-trial.

(vii) The prevailing decision of law in the Eleventh Circuit[20] has not definitively answered the question whether or not a defendant is entitled to receive Brady evidence pre-plea entry.

However, the law in four circuits, note 1, supra, have all decided a Brady claim can be advanced post-plea alleging the government violated its constitutional disclosure obligations, and thus, the plea was not "intelligently" entered and thus void.[21]

The jurisprudence of the Ninth Circuit, Sanchez v. United States, 50 F.3d 1448 (9th Cir. 1995), regarding Brady disclosure in the context of a guilty plea was adopted following the Second Circuit's decision in Miller v. Angliker, supra, note 1.

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[20] United States v. Matthews, 168 F.3d 1234 (11th Cir. 1999).

[21] Note 1 at p. 11.

The Court in Sanchez, 50 F.3d at 1453 citing Miller, 848 F.2d at 1320 stated: "A waiver cannot be deemed 'intelligent and voluntary" if 'entered without knowledge of material information withheld by the prosecution ... [w]e therefore hold that a defendant challenging the voluntariness of a guilty plea may assert a Brady claim.'" Id.

(ix) Sanchez, Id at 1454 adopted Miller's 848 F. 2d at 1322, standard of materiality "whether there is a reasonable probability that but for the failure to disclose Brady material the defendant would have refused to plead [guilty] and would have gone to trial" rejecting Bagley's 473 U.S. at 678, materiality standard: whether the failure to disclose the evidence "undermines confidence in the outcome of the proceeding."

The Second Circuit in Miller, supra, note 1, 848 F.2d at 1320 observed that "even a guilty plea that was 'knowing' and 'intelligent' may be vulnerable to challenge if it was entered without material evidence withheld by the prosecution."

The Second Circuit in United States v. Persico, 164 F. 3d 796, 804 (2d Cir. 1999) noted: "The Government's obligation to disclose Brady material is pertinent to the accused's decision to plead guilty; the defendant is entitled to make that decision with awareness of favorable (exculpatory) evidence known to the Government." (citations omitted).

Thus, both the Ninth arid Second Circuits rejected Bagley's definition of materiality in regard to failure to disclose Brady evidence in the context of a guilty plea, hence, lowering Bagley's strict insurmountable post-appellate review doctrine.

Moreover, the Eighth Circuit in White v. United States, 858 F.2d 416, 424 (8th Cir. 1988) also rejected Bagley's materiality standard adopting a standard similar to Sanchez, supra, and Miller, supra, "whether [the defendant's] knowledge would have affected his decision to forego trial."

Hence, the majority of courts to consider the issue of Brady violation in the guilty plea context has rejected Bagley's materiality analysis: a post-trial appellate review standard favoring the Government by shifting the burden of proof to the defendant to rebut the evidentiary sufficiency of the Government's proof; which is an unconstitutional burden shifting analysis to the defendant.

Bagley's analytical structure and framework to assess "materiality" after-the-fact is unconstitutional where the defendant is required, in conflict with the Fifth Amendment Due Process Clause, to disprove the Government's case, rather than the Government maintaining its burden of proof by establishing proof beyond a reasonable doubt in the presence of the Brady evidence, which is equivalent to Chapman's[22] harmless error analysis.

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[22] Chapman v. California, 386 U.S. 18, 24 (1967). ("[B]efore a federal constitution error can be held harmless, the court must

1B. Bagley's post-appellate review standard of materiality as applied to in a guilty plea context, is an unconstitutional burden shifting scheme that violates due process by requiring the defendant to disprove evidentiary issues in the Government's case.

(x) Unconstitutional Burden-Shifting of Bagley's Materiality Standard

Petitioner contends the Bagley[23] materiality framework of analysis, post-trial, impermissibly shifts the burden of proof to the defense to establish by a "reasonable probability" the outcome of the proceeding would have changed, rather than requiring the Government to prove beyond a reasonable doubt the verdict was not influenced by the Government's breach of its constitutional disclosure duties under the Fifth Amendment.

Because it is the Government that has the affirmative duty to produce all favorable material evidence to the defendant, symmetry requires the Government to have the burden of proof establishing Brady was complied with U.S. v. Price, 566 F.3d 900,

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be able to declare a belief that it was harmless beyond a reasonable doubt.").

[23] Bagley, supra, 473 U.S. at 682.

910 (9th Cir. 2009) quoting Kyles v. Whitley, 514 U.S. 419, 437 (1995) noted:

> "Once the defendant produces such evidence, [of a Brady violation,] the burden shifts to the Government to demonstrate that the prosecutor satisfied his duty to disclose all favorable evidence known to him or that he could have learned from 'others acting on the government's behalf.'" (emphasis added).

Hence, the prosecution's duty to find and disclose Brady evidence as required by the Constitution, and the prosecution's duty to prove it satisfied its Brady obligations is clearly inconsistent with an appellate review standard of materiality that impermissibly imposes on the defendant the burden of proving materiality of evidence at a trial the prosecution had the burden of proof.

The Constitution requires the prosecution to prove each element of an offense beyond a reasonable doubt,[24] thus, the defendant has no constitutional

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[24] In re Winship, 397 U.S. 358, 363-64 (1970) quoting Davis v. United States, 160 U.S. 469, 484 (1895) ("No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon the consciences, to say that the evidence before them is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.")

duty or obligation to disprove the prosecution's use or lack of its evidentiary burden, i.e., the defendant has no burden of proof.

Bagley's shifting of the evidentiary burden of proof to the defendant to prove "materiality" of evidence where the prosecution is constitutionally required to find and disclose to the defendant is in clear conflict with the Fifth Amendment Due Process Clause, as well as numerous decisions of the this Court.[25]

Bagley's "reasonable likelihood of a different result" test imposing a burden of proof on the defendant to disprove elements of the charged offense, is in direct conflict with Winship, infra, note 24 at 364, prosecution's duty to prove its case: every element of the charged offense beyond a reasonable doubt.

Furthermore, the Court in Brady, 373 U.S. at 87, Petitioner contends that an evidentiary test imbedded within a constitutional error as a matter of law, cannot shift the burden of proof to a defendant to disprove factual elements of the offense, and be in conformity with due process.

Bagley's "materiality" test, after the fact, employs a presumption of non-materiality of evidence which

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[25] United States v. Gaudin, 515 U.S. 506 (1995); Sullivan v. Louisiana, 508 U.S. 275, 277-78 (1993); Estelle v. McGuire, 502 U.S. 62, 69 (1991).

was "favorable" to the defendant but willfully suppressed by the prosecution; rather than proof beyond a reasonable doubt on each factual element of the charged offense.[26]

Apprendi, infra, note 26, 530 U.S. at 466, 147 L.Ed.2d at 447, clearly and unequivocally acknowledged the "reasonable doubt" standard of proof required of the prosecution in compliance with due process, stating: "'[B]eyond a reasonable doubt' seems to have occurred as late as 1798. It is now accepted in common-law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all essential elements of guilt." (emphasis added).

Apprendi, supra, relied on several decisions of this Court[27] in concluding reasonable doubt is the prosecution's standard of proof, rather than a disproof of non-materiality standard of Bagley, i.e., unconstitutional burden shifting.

The Court in Mullaney v. Wilbur[28] rejected a presumption of a reasonable doubt requiring rebuttal by a defendant to receive a lesser penalty on the lesser charge of manslaughter.

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[26] Apprendi v. New Jersey, 530 U.S. 466, 147 L.Ed.2d 435, 447 (2000) quoting Winship, supra, note 27 at 364.

[27] Winship, supra; Duncan v. Louisiana, 391 U.S. 145, 151-54 (1968).

[28] 421 U.S. 684, 697-98 (1975).

The Court reasoned, in rejecting a "statutory presumption" requiring rebuttal by the defendant, a state statute could not shift the burden of proof to a defendant by "defining the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." Id.

1C. A test of 'presumption of materiality' should be applied in a pre-trial, pre-plea disclosure analysis of Brady evidence 'favorable' to such a case where the prosecutor does not respond to a request for Brady favorable evidence.

A. Introduction

The current model of appellate review, Bagley, supra, test for materiality where the evidentiary burden of proof is shifted to the defendant is an unworkable standard resulting in few convictions being reversed for deliberate prosecution misconduct, i.e., withholding of evidence favorable and "material" to the defendant's case.

Herdean proposes a new constitutional rule of materiality, in the pre-trial or pre-plea context, that where the prosecution fails to 'respond' to a Brady request, the Court will employ a 'presumption of materiality' to any evidence the prosecution has in its file that is favorable to the defendant.

The 'presumption of materiality' will result in a reversal of a conviction or the withdrawal of a guilty plea unless the Government -- the burden shifts to the Government to prove evidence was not material -- can overcome the presumption employing the Chapman, supra, harmless error analysis (beyond a reasonable doubt), the suppressed Brady evidence did not affect the outcome of the proceeding.

This new rule of constitutional materiality in the application of the Due Process Clause of the Fifth Amendment has support in Brady, supra, 373 U.S. at 88, where the Court stated:

> "We cannot put ourselves in the place of the jury and assume what their views would have been as to whether it did or did not matter whether it was Brady's hands or Boblit's hands that twisted the shirt about the victim's neck. It would be 'too dogmatic' for us to say that the jury would have not attached any significance to this evidence in considering the punishment of the defendant Brady." (brackets, elipses omitted) (emphasis in original).

Thus, the Court in Brady expressly concluded that a post appellate mind probe of what the jury may have "attached any significance to" was futile, and moreover, "too dogmatic" for an appellate court to undertake, hence the Court stated an implied

'presumption of materiality' when the prosecution withholds evidence favorable to the defendant's guilt or punishment, Id, noting:

> "Not without some doubt, we conclude that the withholding of this particular confession [favorable evidence to the defendant] of Boblit was prejudicial to defendant Brady." (emphasis added). Id.

The Court in the seminal case of Brady adopted a 'presumption of materiality' standard of whether or not the defendant was "prejudiced" by the prosecution's constitutional error, regardless of the "good faith" or "bad faith" of the prosecution's intent.

In essence, the Court adopted a strict liability standard of disclosure and employed a presumption of materiality if the defendant was "prejudiced", Id, and reversed the punishment phase of the case remanding for further proceedings.

B. Discussion and Argument

Herdean contends that the prosecution's failure to expressly respond to his Motion for Production of Brady Material (App. 6a-15a) and Motion for the Government to certify its Brady obligations... (App. 16a-35a) is in conflict with the Court's decision in Brady, supra; violated the Due Process Clause; was prejudicial to his plea of guilty; and renders his plea

not "knowing and intelligently entered", and thus void.

i) For support, Petitioner relies on Basic v. Levinson, 485 U.S. 224 (1988) decided just three years after the Court's Bagley decision where the majority opinions in both cases were written by Mr. Justice Blackmun.

Basic, supra, was a securities law case regarding the proper level of disclosure by a publicly-held company in the context of merger discussions. Basic's primary focus and emphasis which the Court analyzed, was the issue of what, is the proper definition of materiality to trigger a statutory disclosure requirement of a publicly-traded company.

The Court relying on its opinion in TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976) "expressly adopt[ed] the TSC Industries standard of materiality for §10(b) and Rule 10b-5 context." (emphasis added).

Following similar reasoning as in Bagley, Justice Blackmun's opinion quoting the language from TSC Industries, Id at 449 noted: " [T]hat to fulfill the materiality requirement 'there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having altered the 'total mix' of information made available' [to the public by the company whether or not to purchase the stock, i. e., analogously to enter a

guilty plea or change the outcome of the trial.]" (emphasis added).

ii) In part two of the Basic opinion the Court considered the question of reliance and fraud on the market, Basic, 485 U.S. at 241.

The fraud on the market theory where the presumption of reliance is employed is analogous to the fraud on the court theory where the prosecution intentionally suppressed Brady evidence. Demjanjuk v. Petrovsky, 10 F.3d 338, 352-54 (6th Cir. 1993) (The Court found that a reckless disregard for the truth, by government lawyers, regarding their disclosure obligations constituted a fraud-on-the-court and reversed the conviction).

In Basic, the Court employed the 'presumption of reliance' theory underpinning the fraud on the market where an omission to disclose or a willful misrepresentation has been made to the public markets. Id at 241-42.

The Court undertook a similar analysis in Strickler v. Greene, 527 U.S. 263 (1999) in the context of a prosecution's 'open file policy', Id at 284.

In Strickler, the prosecution employed an "open file" policy and created a presumption that all favorable evidence was contained in the prosecution's file, thus, an express Brady request was not required. Id.

The presumption of inclusion and thus implicit disclosure resulted in the defense relying on the implications of the open file containing all evidence favorable to the defendant.

The Court noted:

> "... it was reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but also the implicit representation that such materials would be included in the open files tendered to defense counsel for their examination[.]" (emphasis added). Id.

The Basic Court's presumption of reliance' jurisprudence was transferred for use in the criminal context of Brady disclosure in a criminal matter employed the same logic and reasoning underpinning the use of a 'presumption' where it is implicit that a government lawyer's duty to disclose favorable evidence is at issue.

Furthermore, the Strickler Court, Id at 291, acknowledged: "The District Court was surely correct that there is a reasonable possibility that either a total, or just a substantial, discount of Stoltzfus' testimony might have produced a different result, either at the guilt or sentencing phases." (emphasis added).

Applying Brady's 'presumption of materiality' rule, 373 U.S. at 88 quoting Maryland's Court of Appeals, 226 Md., at 227: "We cannot put ourselves in the place of the jury ... it would be 'too dogmatic' for us to say that the jury would not have attached any significance to this evidence[.]" The analysis should have ended there providing Strickler was prejudiced which the Court seem to think, Strickler at 291, he was.

However, applying Demjanjuk, supra, "reckless disregard for the truth" standard of disclosure for the government lawyers, 10 F.3d at 354, a lower materiality standard, where the Court acknowledged there was a "reasonable possibility" the suppressed evidence "might have produced a different result"; a 'presumption of materiality' test imposed on the Government to rebut the presumption beyond a reasonable doubt, Chapman, supra, to sustain the conviction is appropriate where the Government willfully violated due process and affected the substantial rights of the defendant.

(iii) Furthermore, the Court noted in Bagley, 473 U.S. at 682, the Government in its brief acknowledged: "[A]n incomplete response [by the Government] to a specific [Brady] request not only deprives the defense of certain evidence, but also has the effect of [implicitly] representing [Strickler, supra] to the defense that the evidence does not exist."

The Court further noted, Id.:

> "In reliance on this misleading representation [applying Basic's fraud-on-the-market presumption of reliance to Strickler's, supra, 'presumption of reliance' in criminal cases] the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued."

The reliance by the Petitioner on the prosecution's complete deliberate refusal to respond to his requests (App. 6a-15a and App. 16a-35a), violated not only due process, but was a fraud on the court, Demjanjuk, supra, 10 F.3d at 354, equivalent to the fraud-on-the-market theory of Basic where there is a presumption of reliance on the prosecution's material omission to respond to a Brady request.[29]

In essence, by the prosecution not responding fully to either of Petitioner's motions (App. 6a-15a and App. 16a-35a), there's a clear presumption that

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[29] Bagley, 473 U.S. at 682 acknowledged: "We agree that the prosecutor's failure to respond fully to a Brady request may impair the adversary process" and "the reviewing court may consider directly any adverse effect the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility [not probability] that such [adverse] effect might have occurred[.]"

the prosecution intentionally and deliberately withheld "material" Brady evidence (otherwise, the prosecution would have had no issue in responding to the motions and certifying its Brady obligations have been satisfied, if in fact, the prosecution did not withhold favorable "material" evidence) that could have been utilized by the Petitioner before entering his plea of guilty.

Therefore, because Herdean was deprived of such "material" favorable evidence, he relied on this misleading representation by the prosecution and abandoned certain trial strategies and defenses that could have been utilized during his trial; thus, Petitioner would have refused to plead guilty and insisted on going to trial.

Anything less than a full and complete response by the prosecution, which did not occur in the district court sub judice, prejudiced Petitioner's ability to enter a "knowing and intelligent plea" and thus Petitioner's plea was not freely and voluntarily entered, Hill, supra, 479 U.S. at 56, and as a result of the ineffective assistance of counsel by Edward T.M. Garland, Esq. and Jana L. Harris, Esq., the error was further compounded by a complete failure to seek Brady "favorable" evidence; however, the prosecution's Brady disclosure obligations do not hinge on a request by the defense, United States v. Agurs, 427 U.S. 97 (1976).

The Court noted in Agurs, 427 U.S. at 106, "it is reasonable to require the prosecution to respond [to a

Brady request] by furnishing the information or submitting the problem to the judge ... the failure to make any response is seldom, if ever, excusable."

Thus, where, as the prosecution did in the district court sub judice, no response was made to Petitioner's Brady requests (App. 6a-15 and App. 16a-35a), the prosecution's actions were unreasonable and unexcusable, and "impaired the adversarial process", and Petitioner contends and suggests that the Court impose a 'presumption of materiality' on the Government, thus creating a Brady constitutional error voiding his coerced involuntary plea.

Herdean further contends and suggests to the Court to apply the rule of 'presumption of materiality' on the failure by the Government to "respond" to his Brady requests (App. 6a-15a and App. 16a-35a), and unless the Government can rebut the 'presumption of materiality' and thus, a Brady violation, by the Chapman, supra, beyond a reasonable doubt standard, his plea shall stand voided, and the information dismissed with prejudice.

CONCLUSION

The petition should be granted because the Court needs to settle the inconsistencies among the circuits whether or not to allow access to Brady favorable evidence when a defendant pleads guilty.

Furthermore, Herdean has shown beyond any doubt the Bagley post-trial appellate review "materiality" standard is completely unworkable in its application to pre-trial or pre-plea disclosure issues.

Moreover, the illegal burden shifting of Bagley's materiality test as applied to Petitioner unconstitutionally imposed on Petitioner the duty to rebut the prosecution's evidentiary obligations, rather than the prosecution having the burden to prove it complied with its Brady obligation, Price, supra, 566 F.3d at 910.

Herdean's rule of 'presumption of materiality' should be applied whenever the prosecution egregiously breaches its Brady duty by not responding or not completely responding, as occurred sub judice, to a Brady request.

The 'presumption of materiality' is a reasonable test to impose on the Government for "impairing the adversary process" and impeding the search for justice.

Moreover, the Government will be given the opportunity to rebut the presumption by applying a Chapman non-prejudicial, beyond a reasonable doubt standard, taking into account, in a pre-trial or pre-plea context, materiality cannot be determined definitely, and the reviewing court should not be "too dogmatic" in attempting to determine how a jury would view the disputed evidence.

Respectfully submitted this 27th day of April, 2011.



John Herdean, Pro Se
30550 Brush St
Madison Heights, MI 48071

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITES STATES OF AMERICA, *Plaintiff-Appellee,*	
v.	No. 10-10864-GG
JOHN HERDEAN, *Defendant-Appellant.*	

Appeal from the United States District Court for the Northern District of Georgia.

No. 1:08-CR-194-ODE – Orinda D. Evans, District Judge.

Decided and Filed: October 1, 2010

Before: BLACK, BARKETT, and HULL, Circuit Judges

COUNSEL

ON BRIEF: John Andrew Horn, and Gale McKenzie, ASSISTANT UNITED STATES ATTORNEYS – for Appellee; John Herdean, Pro Se – for Appellant.

OPINION

Because Appellant is not collaterally attacking his sentence, but instead attempting to challenge his gulty plea, the Government's motion to dismiss this appeal pursuant to the sentence appeal waiver in Appellant's plea agreement is DENIED.

This appeal is hereby DISMISSED AS FRIVOLOUS sua sponte. See Eleventh Circuit Rule 42-4. All pending motions are DENIED AS MOOT.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITES STATES OF AMERICA, *Plaintiff,*	Decided and Filed: February 10, 2010
v.	CRIMINAL CASE No. 1:08-CR-194-ODE
JOHN HERDEAN, *Defendant.*	

ORDER

In this closed criminal case, pro se defendant John Herdean has moved for the Government to produce evidence pursuant to Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972); and 18 U.S.C. § 3500 [Doc. 54]. Herdean has also requested that the Government "show cause and certify" that its obligations under these authorities "were satisfied" in his case [Doc. 55]. The Government has not responded to these motions. For the following reasons, Herdean's motions to produce evidence [Doc. 54] and to show cause [Doc. 55] are DENIED.

On May 27, 2008, Herdean pled guilty to one count of conspiracy to commit bank and wire fraud pursuant to a negotiated plea agreement [Doc. 7-2]. Herdean was represented by counsel. His plea

agreement contained a waiver-of-appeal provision stating that he "voluntarily and expressly waives the right to appeal his sentence and the right to collaterally attack his sentence in any post-conviction proceeding on any ground" except a direct appeal of a sentence in excess of the applicable sentencing guideline range [Id. at 9]. Herdean was sentenced to thirty months in prison, which was at the low end of the guideline range of 30-37 months [Doc. 29 at 15]. He did not directly appeal his conviction and sentence [Doc. 36 at 10].

On February 17, 2009, Herdean filed a pro se § 2255 motion to vacate his conviction and sentence, claiming that his counsel was ineffective for failing to file a direct appeal or discuss the appeal with Herdean, that he did not enter his guilty plea freely and voluntarily, and that the Court improperly enhanced his sentence [Id.]. This Court denied this motion on June 5, 2009 [Id.], and also denied his subsequent motion for a certificate of appealability [Doc. 40]. Herdean filed a notice of appeal with the United States Court of Appeals for the Eleventh Circuit [Doc. 38], which was initially dismissed for failure to pay the filing fees [Doc. 43]. On November 12, 2009, the Eleventh Circuit reinstated his appeal because Herdean showed good cause for the failure to pay the filing fees, but ultimately denied his motion for a certificate of appealability for failure to make a substantial showing of a denial of a constitutional right [Doc. 53].

Herdean now argues that he has a right pursuant to Brady and related authorities for the Government to produce evidence to him. This claim is clearly foreclosed by District Attorney's Office for the Third Judicial District v. Osborne, 129 S. Ct. 2308 (2009), where the Unites States Supreme Court held that the Brady right to pretrial disclosures does not extend to the postconviction context. See Osborne, 129 S. Ct. at 2319-20. As the Supreme Court reasoned, once a criminal defendant has been found guilty his rights under Due Process Clause are significantly restricted such that the defendant has only a limited liberty interest in postconviction relief. Id. at 2320. This limited liberty interest is adequately fulfilled by federal and state postconviction relief procedures, and it does not require the Government to make evidentiary disclosures. Here, the pretrial rights afforded to criminal defendants under Brady, and Giglio, and 18 U.S.C. § 3500 do not apply to Herdean, who has been found guilty pursuant to a valid plea agreement and whose conviction has been affirmed repeatedly through postconviction procedures. Accordingly, Herdean's motions for production of evidence [Doc. 54] and to show cause [Doc. 55] are DENIED.

SO ORDERED this 10th day of February, 2010.

s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

UNITES STATES OF AMERICA, *Plaintiff,*	Filed: January 5, 2010
v.	CRIMINAL CASE No. 1:08-CR-0194-ODE
JOHN HERDEAN, *Defendant.*	

DEFENDANT HERDEAN'S MOTION FOR THE GOVERNMENT TO SERVE IMMIATELY ALL BRADY, GIGLIO, AND JENCKS ACT EVIDENCE WHICH WAS SERVED ON HERDEAN'S COUNSEL; AND/OR WHICH WAS NOT SERVED ON HERDEAN'S COUNSEL

COMES NOW, Pro Se Defendant, John Herdean ("Herdean") seeking immediate production of all Brady, Giglio, and 18 U.S.C. §3500 ("Jencks Act") evidence in this instant case: US v. Herdean (N.D. of GA), case # 1:08-CR-0194-ODE.

Statement of Facts

¶1.

Defendant Herdean, pro se, requires all Brady, Giglio, and Jencks Act evidence in the Government's possession to pursue collateral issues in his case.

¶2.

Herdean is in immediate need of the constitutional discovery in the possession of the Government, for use as pro se counsel to determine all options available to him for relief.

¶3.

Herdean was never shown or given access to any government discovery evidence by his attorney's Edward T.M. Garland ("Garland") or Jana Harris ("Harris") prior to the entry of his coerced plea. See attached Exhibit A., Affirmation of John Herdean.

Memorandum of Law

A.

1. The U.S. Constitution requires the Government to disclose to a defendant all "favorable evidence", Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); and all evidence which could be used to impeach a government witness

or evidence, Giglio v. U.S., 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

As clearly established federal law, Brady and Giglio, required the Government to serve on Herdean's counsel, Garland, Esq., all Brady and Giglio evidence pre-trial; and all Jencks Act evidence after a government witness testified.

II. Herdean seeks immediate disclosure and production of all evidence, Brady and Giglio, which was served on Garland; what was not served on Garland, and if any was not served on Garland; Herdean seeks disclosure and production on him personally as pro se counsel.

Deliberate deception of a court and jurors by the presentation of known or should have been known false or materially misleading evidence, "is incompatible with rudimentary demands of justice." Giglio, 405 U.S. at 153, 92 S.Ct. 763.

Herdean asserts the Government has in its possession, evidence, Brady evidence, which would completely exonerate him and the same was knowingly and deliberately suppressed, and not disclosed to Herdean prior to his plea, which was coerced by his retained counsel Garland.

B.

I. The Constitution required Herdean to receive all exculpatory evidence (Brady evidence) prior to entry of his plea, and the Governnment was required to inform the Court at Herdean's Rule 11 plea hearing, that there was no reliable factual basis existing for Herdean to plead guilty to bank and wire fraud, and conspiracy for such fraud.

Herdean asserts the Government suppressed material Brady evidence and failed to disclose to him all material Brady evidence.

The Sixth Circuit in Demjanjuk v. Petrovsky, 10 F.3d 338, 352-354 (6th Cir. 1993) held that a Brady violation by government attorneys (AUSAs") constituted fraud on the court.

Reasoning that a government attorney's constitutional discovery obligations are the foundation of the orderly administration of the criminal justice system, and a AUSA conduct must be consistent with the performances of its duties not to recklessly disregard the constitution.

Therefore, Herdean asserts the Government knowingly, willfully and deliberately suppressed exculpatory evidence it currently has in its possession, and violated the "reckless disregard for the truth," standard for government attorneys announced in Demjanjuk.

Conclusion

Herdean asserts the Government knowingly suppressed material Brady evidence as part of a deliberate unconsciousable scheme and plan to convict him of an offense he, as a matter of law, cannot be guilty of where the requisite mens rea did not exist for the charged offense.

Request for Relief

Herdean moves the Court to enter an order as follows:

1) The Government to be required to serve all Brady, Giglio, and Jencks Act evidence on Defendant Herdean;
2) The Government to be required to serve an inventory log of all evidence, if any, produced on defendant Herdean's former counsel Garland and Harris; and
3) The Government to be required to serve the above foregoing requested evidence and inventory log by no later than January 21, 2010 at the following address: John Herdean, Reg. Id # 60115-019, Federal Prison Camp, P.O. Box 150160, Atlanta, Georgia 30315.

Respectfully submitted on this 4th day of January, 2010.

s/ John Herdean
JOHN HERDEAN, Pro Se
Reg. Id # 60115-019
Federal Prison Camp
P.O. Box 150160
Atlanta, Georgia 30315

CERTIFICATE OF SERVICE

I, John Herdean, certify that I have deposited into the legal mail system at the Atlanta Federal Prison Camp, a true and correct copy of: Herdean's Brady and Giglio Motion addressed to the person below:

Gale McKenzie
Assistant U.S. Attorney
600 U.S. Courthouse
75 Spring Street, SW
Atlanta, Georgia 30303

with sufficient postage affixed thereto. This 4th day of January, 2010.

s/ John Herdean
JOHN HERDEAN, Pro Se
Reg. Id # 60115-019
Federal Prison Camp
P.O. Box 150160
Atlanta, Georgia 30315

EXHIBIT A

AFFIRMATION OF JOHN HERDEAN

I, John Herdean, under oath and pursuant to the penalty of perjury, this 4th day of January, 2010, hereby make this affirmation pursuant to 28 U.S.C. §1746 in support of my Brady, Giglio, and Jencks Act Motion and state the following:

¶1.

I retained the Law Firm of Garland, Samuel & Loeb, P.C. to represent me in the following cases: U.S. v. Herdean, Criminal Action No. 1:08-CR-0194-ODE and Civil Action No. 1:09-CV-0423-ODE.

¶2.

Edward T.M. Garland, Esq. ("Garland"), and Jana Harris, Esq. ("Harris"), entered their appearance and "pretended" to represent my interests leading to a coerced plea pursuant to Rule 11.

¶3.

Neither Garland nor Harris ever, during the course of representation, provided me with, nor discussed with me any of the alleged evidence produced by the Government pursuant to Rule 16.

¶4.

Neither Garland nor Harris, ever, during the course of the representation presented to me or

discussed any Brady, Giglio, or Jencks Act evidence produced by the Government.

Neither Garland nor Harris ever informed me or discussed with me any Brady evidence produced by the Government, pursuant to a discovery motion filed by Garland or Harris.

¶6.

Neither Garland nor Harris ever informed me that the Government had produced any Brady, Giglio, or Jencks Act evidence which could have been used in my defense.

Rather, Garland and Harris, bullied me into a coerced plea, lacking any factual basis or proof of intent, or knowledge or consent to any criminal act.

¶7.

Garland's and Harris's representation was influenced by the desire to retain all attorneys fees paid, rather than a vigorous and zealous defense.

I have prepared the foregoing statement under oath, and pursuant to the penalty of perjury.

This affirmation was signed on January 4th, 2010 in the city of Atlanta, Georgia pursuant to 28 U.S.C. §1746.

s/ John Herdean January 4, 2010
JOHN HERDEAN DATE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

UNITES STATES OF AMERICA, *Plaintiff,*	Filed: January 25, 2010
v.	CRIMINAL CASE No. 1:08-CR-0194-ODE
JOHN HERDEAN, *Defendant.*	

DEFENDANT HERDEAN'S DEMAND FOR THE UNITED STATES OF AMERICA THROUGH THE U.S. ATTORNEY'S OFFICE FOR THE NORTHERN DISTRICT OF GEORGIA TO SHOW CAUSE AND CERTIFY THEIR BRADY, GIGLIO, AND JENCKS ACT DISCLOSURE OBLIGATIONS WERE SATISFIED IN U.S. v. HERDEAN CASE NO. 1:08-CR-0194-ODE

COMES NOW, Pro Se Defendant, John Herdean ("Herdean") demanding that the United States of America, through the U.S. Attorneys Office for the Northern District of Georgia, Atlanta Division, certify that all Brady, Giglio, and Jencks Act evidence has been produced on pro se counsel Herdean in U.S. v. Herdean (N.D. of GA), case # 1:08-CR-0194-ODE.

Undisputed Statement of Facts

¶1.

On January 4, 2010 Herdean filed a demand with the district court requesting an order commanding the Government to produce all Brady, Giglio, and Jencks Act evidence in U.S. v. Herdean with a return date of January 21, 2010. See attached Exhibit #1.

¶2.

According to the Clerk's Docket reported on PACER, the district court nor the Government filed any reply to Herdean's demand.

¶3.

Herdean is currently acting as pro se counsel in U.S. v. Herdean, and notified the Court and the Government of such in his demand. Id at 1.

¶4.

As pro se counsel, Herdean is undisputably entitled to a copy of all Brady, Giglio, and Jencks Act evidence in the possession of the Government.

Memorandum of Law

The United States Supreme Court in Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d (1963) stated:

> "We hold that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (emphasis added).

There the Court unequivocally stated the prosecution absolutely must disclose "evidence favorable to [Herdean] upon request", also the Government "violates due process." Id.

Herdean's demand of January 4, 2010 was a "request" served on the Government for the production of all Brady, Giglio, and Jencks Act evidence in U.S. v. Herdean. See attached Exhibit #1.

The Supreme Court clearly stated the Government's Brady obligation is a strict obligation explaining, "irrespective of the good faith or bad faith of the prosecution," the evidence must be produced on Herdean per his request of January 4, 2010.

In essence, as explained in U.S. v. Bagley, 473 U.S. 667 n.6, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) the Government is constitutionally required -

fundamental fairness under the due process clause – to "assist" Herdean with his case by disclosing all favorable evidence to Herdean, whether or not he requested it.

The Court in Bagley, supra, 473 U.S. at 678 noted:

> "The constitutional error, if any, in this case was the Government's failure to assist [Herdean] by disclosing information that might have been helpful[.]" (emphasis added).

The Court reasoned that the Government committed constitutional error, regardless of its subjective intent, i.e., "good faith" or "bad faith" where the Government does not "assist" Herdean with his case by disclosing "favorable" evidence to Herdean. Id.

Therefore, the Government's and Court's failure to "assist" Herdean with his case:

1) the Court's affirmative duty to demand the Government fulfill its constitutional Brady and Giglio disclosure obligations; and
2) the Government's affirmative duty to "assist" Herdean with issues of guilt and punishment by disclosing any "favorable" evidence to Herdean, whether or not requested, Bagley,. Supra, 473 U.S. at 682, 105 S.Ct. 3375;

violated due process of law.

The Court noted, in Bagley, supra, 473 U.S. at 682, 105 S.Ct. 3375 that "the prosecutor's failure to 'respond fully' to [Herdean's] Brady request may impair the adversary process [, i.e., the Government's constitutional duty to 'assist' Herdean with his case.]" (emphasis added).

In this case the U.S. Attorneys Office nor the District Court have fulfilled their sworn duty to uphold the Constitution, i.e., the due process clause application of Brady and Giglio disclosure obligations, to "assist" Herdean with his case where he has made a formal demand on the Government and District Court to receive constitutional required "favorable' evidence, i.e., assistance in his case.

The District Court's and Government's express refusal to fully respond to Herdean's Brady, Giglio, and Jencks Act evidence demand, as the Supreme Court stated in Bagley, supra, 473 U.S. at 678, 105 S.Ct. 3375, is "constitutional error impair[ing] the adversary process." Id at 682.

Moreover, the Sixth Circuit in Demjanjuk v. Petrovsky, 10 F.3d 338, 353-54 (6th Cir. 1993) held that a Government attorney's violation of Brady constituted a "fraud on the court" requiring the conviction to be reversed and vacated.

Herdean expressly stated in his Brady demand that the Government has never "assisted" him in his case by producing all Brady, Giglio, and Jencks Act evidence currently in the prosecution's possession or that was in the prosecutor's possession.

The Second Circuit in Leka v. Portuondo, 257 F.3d 87, 100 (2d Cir. 2001) stated:

> "[the] individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation." (emphasis added).

Hence, the prosecutor on Herdean's case is presumed to have knowledge of all Brady, Giglio, and Jencks Act evidence in or 'that was in' the case file, i.e., FBI 302s, recordings, conflicting witness statements, government agents conclusion, etc.

Accordingly, the prosecutor's constitutional duty to "assist", Bagley, supra, 473 U.S. at 674 n.6, 105 S.Ct. 3375, Herdean "in making [his] case," was and has been vitiated by the persistent willful, intentional and deliberate "constitutional error" of suppression of the "favorable" evidence contained within the prosecutor's file; and thus the Brady violation constitutes a "fraud on the court", Demjanjuk, supra, 10 F.3d at 353-54, requiring Herdean's plea be vacated and set aside.

Conclusion

Herdean made a Brady demand on the Government and the District Court returnable on or before January 21, 2010, and served the same on both the Court and the Government.

The Court and Government both defaulted, thus implicitly committing a Brady violation, i.e., a "constitutional error" requiring Herdean's coerced Rule 11 plea and constitutionally unreasonable sentence to be reversed and vacated, and the information dismissed with prejudice; the deliberate Brady violation constituted "fraud on the court," Id at 353-54.

However, the Supreme Court was very clear in Bagley and its progenies, the Government's Brady and Giglio constitutional disclosure obligations are not predicated on Herdean's request.

The Government has an affirmative duty (Brady) to "assist" Herdean with his case whether or not Herdean made any Brady, Giglio, and Jencks Act request; and failure of the Government "to fully respond may [and did] impair the adversary process."

Request for Relief

Herdean respectfully requests of the U.S. Attorney's Office, for the Northern District of Georgia, Atlanta Division (the "Government"), certify

in writing on or before February 5, 2010 that all Brady, Giglio, and Jencks Act evidence has been produced and served on pro se counsel Herdean in U.S. v. Herdean, case # 1:08-CR-0194-ODE.

Herdean further requests the Government to certify under the penalty of perjury and under oath signed by Gale McKenzie, Esq.; and file a copy of the Brady, Giglio, and Jencks Act certification with the district court clerk's office and serve the same on Herdean, via certified mail, at the following address: John Herdean, Reg. Id # 60115-019, Atlanta Federal Prison Camp, P.O. Box 150160, Atlanta, Georgia 30315 ("OPEN IN THE PRESENCE OF INMATE ONLY").

Respectfully submitted on this 22nd day of January, 2010.

s/ John Herdean
JOHN HERDEAN, Pro Se
Reg. Id # 60115-019
Federal Prison Camp
P.O. Box 150160
Atlanta, Georgia 30315

CERTIFICATE OF SERVICE

I, John Herdean, certify that I have deposited into the legal mail system at the Atlanta Federal Prison Camp, a true and correct copy of: Herdean's Demand for the U.S.A. to Show Cause and Certify Their Brady, Giglio, and Jencks Act Disclosure Obligations Were Satisfied in the U.S. v. Herdean case addressed to the person below:

Gale McKenzie
Assistant U.S. Attorney
600 U.S. Courthouse
75 Spring Street, SW
Atlanta, Georgia 30303

with sufficient postage affixed thereto. This 22nd day of January, 2010.

s/ John Herdean
JOHN HERDEAN, Pro Se
Reg. Id # 60115-019
Federal Prison Camp
P.O. Box 150160
Atlanta, Georgia 30315

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

UNITES STATES OF AMERICA, *Plaintiff,*	Filed: January 5, 2010
v.	CRIMINALCASE No. 1:08-CR-0194-ODE
JOHN HERDEAN, *Defendant.*	

DEFENDANT HERDEAN'S MOTION FOR THE GOVERNMENT TO SERVE IMMIATELY ALL BRADY, GIGLIO, AND JENCKS ACT EVIDENCE WHICH WAS SERVED ON HERDEAN'S COUNSEL; AND/OR WHICH WAS NOT SERVED ON HERDEAN'S COUNSEL

COMES NOW, Pro Se Defendant, John Herdean ("Herdean") seeking immediate production of all Brady, Giglio, and 18 U.S.C. §3500 ("Jencks Act") evidence in this instant case: US v. Herdean (N.D. of GA), case # 1:08-CR-0194-ODE.

Statement of Facts

¶1.

Defendant Herdean, pro se, requires all Brady, Giglio, and Jencks Act evidence in the Government's possession to pursue collateral issues in his case.

¶2.

Herdean is in immediate need of the constitutional discovery in the possession of the Government, for use as pro se counsel to determine all options available to him for relief.

¶3.

Herdean was never shown or given access to any government discovery evidence by his attorney's Edward T.M. Garland ("Garland") or Jana Harris ("Harris") prior to the entry of his coerced plea. See attached Exhibit A., Affirmation of John Herdean.

Memorandum of Law

A.

III. The U.S. Constitution requires the Government to disclose to a defendant all "favorable evidence", Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); and all evidence which could be used to impeach a government witness

or evidence, Giglio v. U.S., 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

As clearly established federal law, Brady and Giglio, required the Government to serve on Herdean's counsel, Garland, Esq., all Brady and Giglio evidence pre-trial; and all Jencks Act evidence after a government witness testified.

IV. Herdean seeks immediate disclosure and production of all evidence, Brady and Giglio, which was served on Garland; what was not served on Garland, and if any was not served on Garland; Herdean seeks disclosure and production on him personally as pro se counsel.

Deliberate deception of a court and jurors by the presentation of known or should have been known false or materially misleading evidence, "is incompatible with rudimentary demands of justice." Giglio, 405 U.S. at 153, 92 S.Ct. 763.

Herdean asserts the Government has in its possession, evidence, Brady evidence, which would completely exonerate him and the same was knowingly and deliberately suppressed, and not disclosed to Herdean prior to his plea, which was coerced by his retained counsel Garland.

B.

II. The Constitution required Herdean to receive all exculpatory evidence (Brady evidence) prior to entry of his plea, and the Governnment was required to inform the Court at Herdean's Rule 11 plea hearing, that there was no reliable factual basis existing for Herdean to plead guilty to bank and wire fraud, and conspiracy for such fraud.

Herdean asserts the Government suppressed material Brady evidence and failed to disclose to him all material Brady evidence.

The Sixth Circuit in Demjanjuk v. Petrovsky, 10 F.3d 338, 352-354 (6th Cir. 1993) held that a Brady violation by government attorneys (AUSAs") constituted fraud on the court.

Reasoning that a government attorney's constitutional discovery obligations are the foundation of the orderly administration of the criminal justice system, and a AUSA conduct must be consistent with the performances of its duties not to recklessly disregard the constitution.

Therefore, Herdean asserts the Government knowingly, willfully and deliberately suppressed exculpatory evidence it currently has in its possession, and violated the "reckless disregard for the truth," standard for government attorneys announced in Demjanjuk.

Conclusion

Herdean asserts the Government knowingly suppressed material Brady evidence as part of a deliberate unconsciousable scheme and plan to convict him of an offense he, as a matter of law, cannot be guilty of where the requisite mens rea did not exist for the charged offense.

Request for Relief

Herdean moves the Court to enter an order as follows:

4) The Government to be required to serve all Brady, Giglio, and Jencks Act evidence on Defendant Herdean;
5) The Government to be required to serve an inventory log of all evidence, if any, produced on defendant Herdean's former counsel Garland and Harris; and
6) The Government to be required to serve the above foregoing requested evidence and inventory log by no later than January 21, 2010 at the following address: John Herdean, Reg. Id # 60115-019, Federal Prison Camp, P.O. Box 150160, Atlanta, Georgia 30315.

Respectfully submitted on this 4th day of January, 2010.

s/ John Herdean
JOHN HERDEAN, Pro Se
Reg. Id # 60115-019
Federal Prison Camp
P.O. Box 150160
Atlanta, Georgia 30315

CERTIFICATE OF SERVICE

I, John Herdean, certify that I have deposited into the legal mail system at the Atlanta Federal Prison Camp, a true and correct copy of: Herdean's Brady and Giglio Motion addressed to the person below:

Gale McKenzie
Assistant U.S. Attorney
600 U.S. Courthouse
75 Spring Street, SW
Atlanta, Georgia 30303

with sufficient postage affixed thereto. This 4th day of January, 2010.

s/ John Herdean
JOHN HERDEAN, Pro Se
Reg. Id # 60115-019
Federal Prison Camp
P.O. Box 150160
Atlanta, Georgia 30315

EXHIBIT A

AFFIRMATION OF JOHN HERDEAN

I, John Herdean, under oath and pursuant to the penalty of perjury, this 4th day of January, 2010, hereby make this affirmation pursuant to 28 U.S.C. §1746 in support of my Brady, Giglio, and Jencks Act Motion and state the following:

¶1.

I retained the Law Firm of Garland, Samuel & Loeb, P.C. to represent me in the following cases: U.S. v. Herdean, Criminal Action No. 1:08-CR-0194-ODE and Civil Action No. 1:09-CV-0423-ODE.

¶2.

Edward T.M. Garland, Esq. ("Garland"), and Jana Harris, Esq. ("Harris"), entered their appearance and "pretended" to represent my interests leading to a coerced plea pursuant to Rule 11.

¶3.

Neither Garland nor Harris ever, during the course of representation, provided me with, nor discussed with me any of the alleged evidence produced by the Government pursuant to Rule 16.

¶4.

Neither Garland nor Harris, ever, during the course of the representation presented to me or

discussed any Brady, Giglio, or Jencks Act evidence produced by the Government.

Neither Garland nor Harris ever informed me or discussed with me any Brady evidence produced by the Government, pursuant to a discovery motion filed by Garland or Harris.

¶6.

Neither Garland nor Harris ever informed me that the Government had produced any Brady, Giglio, or Jencks Act evidence which could have been used in my defense.

Rather, Garland and Harris, bullied me into a coerced plea, lacking any factual basis or proof of intent, or knowledge or consent to any criminal act.

¶7.

Garland's and Harris's representation was influenced by the desire to retain all attorneys fees paid, rather than a vigorous and zealous defense.

I have prepared the foregoing statement under oath, and pursuant to the penalty of perjury.

This affirmation was signed on January 4th, 2010 in the city of Atlanta, Georgia pursuant to 28 U.S.C. §1746.

s/ John Herdean — January 4, 2010

JOHN HERDEAN — DATE